88-749

No. _____

FILED
NOV 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM KUNTZ III

AND

WESTMINISTER COMPANY, INC.,

aka ONE WESTMINISTER COMPANY, INC.,

Petitioners,

vs.

THE CITY OF DAYTON, OHIO

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Attorneys for Petitioners

QUESTION PRESENTED FOR REVIEW

When state and municipal law authorize urban renewal for the purpose of the clearance of blight, does a municipality violate the 5th and 14th Amendment rights of a property owner when it takes the owner's real estate without a prior legislative determination that it is in a blighted area and without following its own municipal ordinances and state law in regard to the criteria for blight?

STATEMENT OF INTERESTED PARTIES

Certain defendants originally named in the Complaint have not been listed as parties because petitioners believe that they are not interested in the outcome of this petition and did not participate in the appeals below. Pursuant to that belief, there are no interested parties who have not been identified in the caption.

Petitioner, Westminister Company, Inc., is a compajny wholly owned by Petitioner Kuntz and has no affiliates or subsidiaries.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM KUNTZ III AND
WESTMINISTER COMPANY, INC.,
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vs.

THE CITY OF DAYTON, OHIO
Respondent

-

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

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Attorneys for Petitioners

William Kuntz III and One Westminister Company, Inc., defendants in the action below, respectfully pray that a Writ of Certiorari issue to review the decision of the Supreme Court of Ohio, entered on the 13th day of July, 1988.

OPINIONS BELOW

The Supreme Court of Ohio's entries denying petitioners' motion to certify the record and for rehearing, dated June 15, 1988 and July 13, 1988, respectively, are reproduced in Appendix A.

The opinion of the Court of Appeals of Montgomery County, Ohio, filed on March 3, 1988, is reproduced in Appendix B.

The Decision and Judgment Entry of the Montgomery County Court of Common Pleas, entered February 23, 1987, and July 2, 1987, are reproduced in Appendix C.

JURISDICTION

The entry denying petitioners' motion for rehearing in the Supreme Court of Ohio was filed on July 13, 1988. This petition was filed within 90 days of July 13, 1988. The jurisdiction of this Court is founded upon 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due proces of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

Section l. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

OHIO CONSTITUTION

ARTICLE I, SECTION 19

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

STATEMENT OF THE CASE

Petitioners, the owners of real estate in the central business district of Dayton, Ohio, contested the effort of the City of Dayton to take their real estate for urban renewal purposes. The basis of the contest is that the City failed to follow its own ordinances and the criteria under Ohio Law which requires that an area be declared to be blighted before urban renewal power can be exercised in Ohio.

On March 27, 1985, the Dayton City Commission passed Ordinance 27172 approving an urban renewal plan known as Arcade Square II. On December 4, 1985, the Dayton City Commission adopted Ordinance 27306, amending Section I of Ordinance 27172. (Ordinance 27172 and Ordinance 27306 are reproduced in Appendix D.) The primary purpose of the Arcade Square II plan was to overcome the economic failure of a previous urban renewal plan, known as Arcade Square I. (Transcript of Trial: Testimony of Richard B. Helwig, p. 13; Testimony of Michael Schierloh, p. 36.) Dayton made no finding that the area where petitioners' property was located is a slum or is blighted.

As a result of the passage of Ordinances 27172 and 27306, petitioners' property, located at 44 West Third Street, Dayton, Ohio, was sought to be appropriated for clearance and resale to a private developer who wanted the property to provide parking to support an office building he hoped to build. On May 14, 1986, the Dayton City Commission adopted Ordinance 27407 declaring its

intention to appropriate petitioners' property. (Ordinance 27407 is reproduced in Appendix D)

On August 14, 1986, the City of Dayton filed a complaint for appropriation in the Montgomery County Court of Common Pleas. (T.D. 1.) Petitioners answered that respondent's attempted appropriation was in violation of their rights secured by the Ohio Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States. (T.D. 9 and 20.)

On February 23, 1987, the trial court concluded that the City had the right to appropriate petitioners' property. (Opinion reproduced in Appendix C.) A separate trial was held to assess the amount of compensation petitioners were entitled to receive as a result of the City's appropriation of their property.

Petitioners appealed the decision of the trial court on June 22, 1987. [1](T.D. 52.) Again, petitioners argued that respondent's appropriation of their property violated their rights secured by the Ohio Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States. (Brief of Appellants, at p. 14) Petitioners' contention in both the trial and appellate courts was that the failure of the municipal government to follow the requirements of state law and their own ordinances to determine that the area where pettitioners' property was located was blighted constituted a violation of petitioners' Fifth Amendment rights as applied to the states through the Fourteenth Amendment. The Court of Appeals of the Second Appellate District of Montgomery Coun-

1 Under Ohio practice, appellate courts do not have jurisdiction in an appropriations case until after the determination of value of the property taken. Cincinnati Gas & Electric v. Pope, 54 Ohio St.2d 12 (1978).

ty, Ohio, affirmed the judgment of the trial court on March 3, 1988. (Opinion reproduced in Appendix B.)

Both the trial and appellate courts recognized that federal constitutional rights were being raised, but chose not to deal with them except to the extent that they relied upon generic statements by the United States Supreme Court that urban renewal is, in principle, a permissible use of governmental power. There was never an issue in the case as to legitimacy of the urban renewal power. The purpose of the urban renewal plan was not determined by the legislative body to be the removal of blight, but rather to help save the contiguous urban renewal project which had failed. While some states recognize economic rejuvenation as a legitimate public purpose for urban renewal, the state of the law in Ohio is that the only valid purpose of urban renewal is the removal of blight. The legislation approving the urban renewal plan, under which the petitioner's property was taken, was not based upon a finding that it was in a blighted area.

On March 30, 1988, petitioners appealed the Court of Appeals' decision to the Supreme Court of Ohio. Petitioners argued that the appropriation of their property violated their rights secured by the Constitutions of Ohio and the United States. (Memorandum in Support of Jurisdiction, at p. 19.) On June 15, 1988, the Supreme Court of Ohio denied petitioners' motion to certify the record and dismissed the appeal. (Entry, reproduced in Appendix A.) On June 24, 1988, petitioners filed a motion for rehearing with the Supreme Court of Ohio that was denied on July 13, 1988. (Rehearing Entry, reproduced in Appendix A.)

REASONS FOR GRANTING THE WRIT

The basic issue in this petition is whether the respondent's failure to follow the law of the State of Ohio and the ordinances of the City of Dayton in appropriating petitioners' property constitutes a violation of petitioners' Fifth and Fourteenth Amendment rights. Petitioners believe that respondent has taken their property in violation of their rights secured by the Constitution of the United States.

This court must determine whether the Dayton ordinances, authorizing the exercise of the City's eminent domain powers, contained the legislative findings required by the laws in the State of Ohio and the ordinances of the City of Dayton, Ohio.

Section 40.14(E) of the Dayton Revised Code of General Ordinances (hereinafter "Dayton Code") requires, inter alia, that:

> "The ordinance of the Commission approving an urban renewal or redevelopment plan shall include the following findings:
>
> (1) Specific findings of fact as to the conditions in the project area which make it a slum, blighted, deteriorated or deteriorating area, and findings that the project area is a slum, blighted, deteriorated or deteriorating area." (Emphasis added)

This is based on the requirements of Article I, Section 19, of the Ohio Constitution and State ex rel. Bruestle v. Rich, 159 Ohio St. 13 (1953).

Even a cursory examination of the Dayton ordinances approving the Arcade Square II Urban Renewal Plan (reproduced in Appendix D) establishes that the requisite "specific findings" were not made. Ordinance 27306, for example, finds merely that nine of fourteen buildings are rated "substandard" under the criteria in the project area report. This finding is clearly inadequate as a matter of law.

First, there are no specific findings of fact in the ordinances as to the conditions which make the area a slum, blighted, deteriorated, or deteriorating area. There are not even subsidiary findings showing that the "substandard" structures fall within the definition of "slum, blighted or deteriorated area" as that term is defined in Section 40.09(L) of the Dayton Code.[2] Most buildings over the age of 25 years are "substandard" in the opinion of architects.

Secondly, and even more importantly, the Dayton City Commission absolutely failed to make the requisite "findings that the

2 Dayton Code Section 40.09(L) defines "slum, blighted or deteriorated area" as: "An area within the corporate limits of the City in which there are a majority of structures or other improvements, which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation,light, air, sanitation, or open spaces, high density of population and overcrowding, unsafe and unsanitary conditions, or the existence of conditions which endanger life or property by fire or other hazards and causes, or any combination of such factors, and an area with overcrowding or improper location of structures on the land, the excessive dwelling unit density, detrimental land uses, or conditions, unsafe, congested, poorly designated streets, or inadequate public facilities or utilities, all of which substantially impair the sound growth and planning of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals and general welfare."

project area is a slum, blighted, deteriorated or deteriorating area." See, Dayton Code Section 40.14(E)(1). As noted above, this finding is mandatory. (See, supra, Dayton Code Section 40.14(E), providing that "[t]he ordinance approving an urban renewal or redevelopment plan shall include the following findings" (emphasis supplied))

The Court of Appeals of Montgomery County, Ohio found that the two ordinances approving the Arcade Square II Urban Renewal Plan and authorizing the City to appropriate private property in the plan's project area failed to contain an express finding by the Dayton City Commission that the proposed project area was "a slum or a deteriorating area." (Appendix B: Opinion.) The court went on to say that:

> "Also, neither ordinance sets forth specific findings of fact by the City as to the conditions in the project area which make it a slum or deteriorating area." (Appendix B: Opinion.)

The Court of Appeals also found that the report prepared by the City Planning Commission, although containing findings as to the conditions of the buildings in the project area

> "does not contain a conclusion that the area surrounding the Arcade was a slum or a blighted area or a deteriorating area. By its terms, Section 40.14(E)(1) requires that the City Commission make such a finding." (Appendix B: Opinion)

The court noted that although the two ordinances approving the Arcade Square II plan failed to contain the required findings, the preamble to a third piece of legislation, Ordinance 27407, directing the city attorney to make application to the Montgomery

County Court of Common Pleas for the appropriation of petitioners' property, contained

> "a statement that immediate acquisition of (petitioners') property is necessary to expedite redevelopment of the project and thereby prevent slum, blight and deterioration which exists or existed in the project area." (Appendix B: Opinion.)

The court went on to hold that this preamble was sufficient to meet the required findings and that the City therefore "substantially complied with Section 40.14(E)(1)" of the Dayton Code that requires specific findings of fact concerning the project area be made in "the ordinance of the Commission approving an urban renewal or redevelopment plan " (Emphasis added). The court stated that:

> "Although Ordinance 27407 was not the ordinance which adopted the Arcade Square II plan, it was passed as part of the City's efforts to implement the plan. Thus, we conclude that Ordinance 27407 can be read in conjunction with Ordinance 27172 and Ordinance 27306 as providing the necessary finding of blight or deterioration required by Section 40.14(E)(1)." (Appendix B: Opinion)

The Court of Appeals also suggests that the City Commission, in reviewing and accepting the report prepared by the City Planning Board, "implicitly adopted the factual findings contained in that report, including the architect's evaluation of each building." In other words, the court holds that by simply referring to a City Planning Board's report which finds that nine of fourteen buildings in the project area are "substandard", the City

> "in effect made factual findings supporting a conclusion that the buildings in the project area, including the building in which (petitioners') property was located, were in a deteriorating state." (Appendix B: Opinion.)

In Harry Goldstein v. Cincinnati, (Case No. C-800802, First District Court of Appeals, April 8, 1981), the City of Cincinnati had argued, much like the Court of Appeals does here, that the project area could properly be taken by the City because of substandard conditions.

In Goldstein, the court stated that it was irrelevant to the right to take issue whether or not the property was substandard. Rather, there must be a finding that the property was located in a slum, blighted or deteriorated area. The City of Cincinnati prevailed in Goldstein because the required legislative findings had been made. City Council had reconfirmed in its ordinance approving the urban renewal plan the finding that the area was blighted, as that term was defined by the City.

Here, the requisite legislative findings clearly were not made in the ordinances that approved the urban renewal plan as required by the Dayton Code. These are not simply formalistic or technical requirements that can be overlooked. The Dayton ordinances authorizing the exercise of eminent domain when specific findings are made are founded upon constitutional requirements. As the court recognized in Eighth and Walnut Corporation v. Public Library, 57 Ohio App.2d 137, 146, 11 Ohio Op.3d 128, 133 (Hamilton County 1977):

> "[a] determination by the municipality that the area to be redeveloped through condemnation and resale is a slum or afflicted with blight or deterioration may fairly be said

> to be a condition precedent to the constitutional exercise of eminent domain powers as conducive to the public welfare under Section 19, Article I, of the Ohio Constitution, State ex rel. Bruestle v. Rich, [159 Ohio St. 13, 50 Ohio Op. 6 (1953)], paragraph 5 of the syllabus..." (Emphasis supplied)

Thus, Ohio law requires that before eminent domain powers may be exercised for urban redevelopment, a municipality must make specific findings and determine that the area is a slum or blighted area. "Without such determination of blight, the constitutional basis for the exercise of eminent domain would clearly fail." Eighth and Walnut Corporation v. Public Library, supra, 57 Ohio App.2d at 147, 11 Ohio Op.3d at 133 (Hamilton County 1977). See also, Grisanti v. Cleveland, 18 Ohio Op. 2d 143 (C.P. Cuyahoga County 1961), syllabus paragraph 7, noting that a city must make a legislative determination that an area is blighted and deteriorating to justify a taking of property.

In the absence of "specific findings of fact" of slum, blighted or deteriorated conditions, and in the absence of a "finding that the project area is a slum, blighted, deteriorated or deteriorating area," the City had no legal authority to exercise its eminent domain powers. As Chief Justice Hughes wrote, it is "the rule in Ohio, as elsewhere, that the power conferred upon a municipal corporation to take private property for public use must be strictly followed." Cincinnati v. Vester, 281 U.S. 439 (1930). The Court in Cincinnati v. Vester held that because "the proceedings for excess condemnation of the properties involved in these suits were not taken in conformity with the applicable law of the state," the takings were invalid. 281 U.S. at 449.

The lower courts have given mere lip service to the constitutional and local requirement that the City Commission make specific factual findings of slum or blight to justify the taking of private property for an urban renewal project such as the Arcade Square II Urban Renewal Plan. A taking of private property in violation of these requirements must be set aside.

CONCLUSION

Urban renewal in Ohio must be primarily based upon the clearance of slum or blight. Here, the City of Dayton did not, because they could not, base their attempted appropriation upon the clearance of slum or blight. The primary purpose of the Arcade Square II Urban Renewal Plan was the economic salvation of a failing urban renewal plan, Arcade Square I, and did not justify the City of Dayton's appropriation of petitioners' property.

The failure to follow the strict rules imposed by state and local law for the appropriation of petitioners' property constitutes a violation of petitioners' Fifth and Fourteenth Amendment rights.

For the reasons stated, the taking of petitioners' property was unlawful and a Writ of Certiorari should issue to review the judgment of the courts below.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

COLUMBUS

1988 TERM

To wit: June 15, 1988

Case No. 88-786

City of Dayton
Appellee,

v. ENTRY

William Kuntz III, et al.,
Appellants

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Manley, Burke & Fischer.

/s/ _____
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 15th day of June, 1988.

MARCIA J. MENGEL, CLERK

/s/ James F. Bumbren, DEPUTY

THE SUPREME COURT OF OHIO

COLUMBUS

1988 TERM

To wit: July 13, 1988

Case No. 88-786

City of Dayton,
Appellee,
v. REHEARING ENTRY
William Kuntz III, (Montgomery County), et al.,
Appellants

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 13th day of July, 1988.

MARCIA J. MENGEL, CLERK
/s/ Rita A. Jackson, DEPUTY

APPENDIX B

IN THE COURT OF APPEALS OF

MONTGOMERY COUNTY, OHIO

CITY OF DAYTON, OHIO
Plaintiff-Appellee
vs.
WILLIAM KUNTZ, III, et al.
Defendant-Appellant

CASE NO. CA 10513
C.P. NO. 86-2439

OPINION

Rendered on the 3rd day of March, 1988.

J. Anthony Sawyer

101 West Third Street,

Dayton, OH 45402

Attorney for Plaintiff-Appellee

Robert E. Manley

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Cincinnati, OH 45202

Attorney for Defendant-Appellants

FAIN, J.

Defendant-appellant William Kuntz III appeals from a judgment of the Montgomery County Court of Common Pleas upholding the right of plaintiff-appellee City of Dayton (City) to appropriate his property as part of an urban renewal plan. After reviewing the record, we conclude that the City's decision to appropriate Kuntz's property was not arbitrary or unreasonable and was supported by the necessary findings of fact. We further conclude that Kuntz has no standing to assert his claim that the City had a statutory obligation to prepare a relocation plan for his tenant. Consequently, the judgment of the trial court will be affirmed.

I

On March 27, 1985, the Dayton City Commission passed Ordinance 27172 adopting an urban renewal plan prepared by the City Planning Department, known as Arcade Square II.[3] It appears from the record that while one purpose of this plan was to eliminate blighting conditions in the area, the main purpose of the plan was to support and to complement earlier attempts to renovate the Arcade by broadening the scope of renewal efforts to include the surrounding block. According to Michael Schierloh, Director of Urban Development and Development Manager for the City of Dayton, the City's goal was to turn the Arcade into a focal point for the downtown area. Richard Helwig, City Manager for the City of Dayton, testified that both of the Arcade Square renovation projects were intended to strengthen the downtown economy.

Under the plan, the block surrounding the Arcade was divided into six parcels, A through F. According to Dayton city of-

3 On December 4, 1985, the Dayton City Commission passed Ordinance 27306 which amended Section I of Ordinance 27172.

ficials who testified at the trial, it was the City's plan to clear the area from the Arcade to Main Street (Package F) and to use the land to build an office tower. The area from Metro Market to Ludlow Street (Package B) was to be cleared and used for a parking garage. According to the witnesses, buildings in the project area that were considered either architecturally significant (i.e., the Gibbons Annex) or essential to the downtown community (i.e., Metro Market) were to be retained.

Defendant-appellant William Kuntz III owned an undivided one-half interest in a portion of a building located in Package B. The other one-half interest in the property was held by Westminster Co., a corporation wholly owned by Kuntz.[4] Kuntz's property was located at 44 West Third Street and was designated Lot 6 in the Arcade Square II plan. A commercial establishment known as the Alladin Cleaners occupied the Kuntz Property.

The Arcade Square II Urban Renewal Plan included an architect's evaluation of the buildings in the project area. The subject buildings were classified as either "standard" or "substandard" under three categories of criteria. Criteria 1a related to structural integrity; Criteria 1b related to fire resistance; Criteria 1c related to building components such as plumbing, heating and lighting systems. According to John M. Becher, Deputy Director of the City's Planning Department, 75% of the buildings in the Arcade Square II project area were considered "substandard."

The Kuntz property was rated substandard under Criteria 1c, meaning that six of the described components were inadequate to

---

4 Although the record is far from clear on this point, it appears that Westminster Co. was involved in Chapter 11 bankruptcy proceedings at the time of the trial.

such a degree that taken in combination, rehabilitation of the property was prohibitively expensive. According to the architect's report, the building in which the Kuntz property was located was deficient in the following respects:

> Plumbing: Abandoned and/or inoperable fixtures exist at all levels of both occupied and nonoccupied areas. The number and locations of existing fixtures is inadequate to comply with current code requirements.
>
> Heating: Inoperable (not currently used).
>
> Electrical: Electrical systems are inoperable and inadequate for nonoccupied areas.
>
> Light & Ventilation: Inoperable windows and mechanical ventilation systems (some areas lack mechanical ventilation) lighting is inoperable and inadequate.
>
> Fire Safety: Ingress and egress from mezzanine and second floor is inadequate. There are no enclosed internal stairs leading to the exterior. Two such stairs would be required by current codes.
>
> Windows and Doors: Exit access corridors are nonexistent and doors for such are nonexistent. Exterior walls with limited fire separation are questionable as to the fire ratings and doors. Windows in these walls are not currently rated for even minimum opening requirements.

According to both Mr. Becher and Mr. Schierloh, Kuntz's property was situated in such a way that construction of the proposed parking garage would have been impossible or nearly impossible without the property. On May 14, 1986, the City Commission adopted a resolution declaring its intention to appropriate

the fee simple interest in Kuntz's property. By Ordinance 27407, the City Commission declared that it was necessary immediately to appropriate the land and authorized the city attorney to make application to the Montgomery County Court of Common Pleas for a determination of compensation. On August 14, 1986, the city attorney filed a complaint for appropriation pursuant to R.C. Chapter 163. Kuntz filed his answer on September 9, 1986. A hearing on the City's right to appropriate the property was held before Visiting Judge Nichols on February 2, 3, and 4, 1987. In a Decision and Entry filed February 23, Judge Nichols held that Kuntz had failed to carry his burden under R.C. 163.09 to show that the City had abused its discretion in determining that it was necessary to appropriate his property.[5]

According to Judge Nichols, the area in question was in a deteriorated and blighted condition and there was a reasonable relationship between the remedy of urban renewal and the problem. Judge Nichols concluded that the City had the right to appropriate Kuntz's property.

A separate hearing was later held to assess the amount of compensation Kuntz was entitled to receive. A jury set the amount of

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5 R.C. 163.09 (B): When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity.

compensation at $235,000. On June 2, 1987, Judge Kessler filed a judgment entry holding that, upon deposit of the compensation and costs, the City could take possession and use the property. From this decision, Kuntz appeals.

II

Kuntz's First Assignment of Error is as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS-APPELLANTS BY FINDING THAT THE APPROPRIATION OF DEFENDANTS-APPELLANTS' PROPERTY WAS PRIMARILY MOTIVATED BY THE CITY'S DECISION TO ENGAGE IN AN URBAN RENEWAL PLAN FOR THE REMOVAL OF SLUMS AND THE CLEARANCE OF BLIGHTED BUILDINGS.

Kuntz does not dispute the amount of compensation he was awarded. Rather, Kuntz contends that the City's decision to appropriate his property violates the United States Constitution, the Ohio Constitution, and the Dayton Revised Code of General Ordinances. Since the building in which the Kuntz property was located has already been demolished, Kuntz maintains that his remedy is to recover his property plus damages for the demolition of the building.

A

In his First Assignment of Error, Kuntz contends that under Article I, Section 19 of the Ohio Constitution, as interpreted by the Ohio Supreme Court in State, ex rel. Bruestle, v. Rich (1953), 159 Ohio St. 13, land may be appropriated and conveyed to a private owner for redevelopment only when the purpose of the redevelopment project is to eliminate slum or blight.[6] Kuntz argues that in the present case, the only determination made by the City was that a majority of the buildings in the project area were "substandard." According to Kuntz, since this is not the equivalent of a determination that the area surrounding the Arcade was "slum, blighted, or deteriorated area" as defined in Section 40.09(L) of the Dayton Revised Code of General Ordinances, the City's appropriation of his property violates the rule set forth in Bruestle, supra.[7] Kuntz also cites a decision from the Court of Ap-

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6 ArtI, Section 19, Ohio Constitution: Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner

7 Section 40.09(L) defines "slum" as follows: An area within the corporate limits of the city in which there are a majority of structures or other improvements, which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsafe and unsanitary conditions, or the existence of conditions which endanger life or property by fire or other hazards and causes, or any combination of such factors, and an area with overcrowding or improper location of structures on the land, excessive dwelling unit density, detrimental land

peals for Hamilton County, Eighth & Walnut Corp. v. Public Library (1977), 57 Ohio App. 2d 137, for the proposition that as a condition precedent to a city's exercise of the eminent domain power for the purpose of urban renewal, the city must determine that slum or blight exists. According to Kuntz, since there has been no determination by the City that the area surrounding the Arcade was a slum, appropriation of his property for an urban renewal project was improper.

Kuntz contends that the City's sole purpose in adopting the Arcade Square II project was to bolster a previous attempt to renovate the Arcade Square, which had proven to be a financial failure. According to Kuntz, this decision contravenes Article I, Section 19 of the Ohio Constitution, since urban renewal for the purpose of economic redevelopment does not constitute a valid "public use" under Ohio law.

We disagree with Kuntz's reading of the two cases cited above. In State, ex rel. Bruestle, supra., the Ohio Supreme Court held that urban redevelopment is a purpose for which public funds can be expended and the power of eminent domain can be exercised. 159 Ohio St. at 23. According to the Court, an urban renewal plan is not rendered unconstitutional simply because there may be an incidental nonpublic use of the property or benefit from its taking. 159 Ohio St. at 27. The Court also held that the phrase "public use" found in the second sentence of Article I, Section 19 was not intended as a limitation on the phrase "public welfare" found in the first sentence. 159 Ohio St. at 23-25. In Eighth & Walnut Corp. v Public Library, supra, the Court of Appeals for Hamilton County held that in order for a municipality to appropriate property for urban renewal, it must make a determination that a need for urban renewal exists. According to the court, a city may

not condemn property solely at the request of an organization not authorized to exercise the power of eminent domain. 57 Ohio App. 2d at 147-148. While there is language in both of these opinions that arguably lends support to Kuntz's position, we do not believe that either case stands for a black letter rule that property may be appropriated for an urban renewal project only when the purpose of the project is slum clearance.

Eminent domain is defined as the power of the sovereign to take property for public use without the owner's consent, upon making just compensation. See, 1 Nichols, Eminent Domain (Rev. 3rd Ed. 1986) 1-6, Section 1.11. The question of what constitutes a "public use" is a determination to be made by the legislature subject to judicial review. In reviewing exercises of the eminent domain power, courts have generally followed one of two approaches in determining whether a particular appropriation was for a public use. Under the first approach, courts have read the term "public use" narrowly and have held that land taken by eminent domain must be made available for use by the public or a segment of the public or by a public agency. See, id., at Section 7.021[1]. Courts following the second approach have taken a more expansive view and have held that "public use" means any use which results in benefit to the community generally. See, id., at Section 7.02[2]. Although the Ohio Supreme Court appeared to adopt the limited approach in Pontiac Improvement Co. v. Bd. of Commrs. (1922), 104 Ohio St. 447, we note the following language in State, ex rel. Bruestle, v. Rich, supra:

> The contention of respondents, that Section 19 of Article I of the Ohio Constitution prohibits the exercise of the right of eminent domain where there will ultimately be no use or right of use of the property taken on the part of the

> public or some limited portion of the public, is supported by paragraph three of the syllabus and some of the language of the opinion in Pontiac Improvement Co. v. Board of Commissioners, 104 Ohio St., 447, 135 N.E., 635, 23 A.L.R. 866. However, the decision in that case could rest either upon the statement of law set forth in the first paragraph of the syllabus or that in the second paragraph of the syllabus. So far as the third paragraph of the syllabus supports the foregoing contention of respondents, it appears to be contrary to the intention expressed by the people by the words used in Section 19 of Article I of the Constitution and inconsistent with other pronouncements of this court. See, for example, State, ex rel. Shafer, v. Otter, County Surveyor, 106 Ohio St., 415, 140 N.E. 399; Sessions v. Crunkilton, Treas., 20 Ohio St., 349, 356; Reeves v. Treasurer of Wood County, 8 Ohio St., 333; Shaver v. Starrett, 4 Ohio St., 495; Lake Erie & Western Rd. Co. v. Commissioners, 63 Ohio St., 23, 57 N.E. 1009; Chesbrough v. Commissioners, 37 Ohio St., 508, 516; Alma Coal Co. v Cozad, Treas., 79 Ohio St. 348, 357, 87 N.E., 172, 20 L.R.A. (N.S.), 1092; Chicago & Erie Rd. Co. v. Keith, 67 Ohio St., 279, 288, 65 N.E. 1020, 60 L.R.A., 525.

159 Ohio St. at 26. See also, St. Stephen's Club v. Youngstown Metropolitan Hous. Auth. (1953), 160 Ohio St. 194, 199; State, ex rel. Allerton Parking Corp., v. City of Cleveland (1965), 4 Ohio App. 2d 57, 65-66, affirmed (1966), 6 Ohio St. 2d 165.

We have found a number of cases from other jurisdictions that support Kuntz's contention that economic redevelopment does not constitute a public use. See, Opinion of the Justices of the

Supreme Judicial Court given Under the Provisions of Section 3 of Article VI of the Constitution (1957), 152 Maine 440, 131 A. 2d 904; City of Little Rock v. Raines (1967), 241 Ark. 1071, 411 S.W. 2d 486; City of Owensboro v. McCormick (Ky. 1979), 581 S.W. 2d 3; Karesh v. City Council of City of Charleston (S.C. 1978), 247 S.E. 2d 342. However, other cases recognize economic concerns such as industrial development and urban revitalization as valid public uses supporting the exercise of the eminent domain power. See, City of Duluth v. State (Minn. 1986), 390 N.W. 2d 757; Prince George's Cty. v. Collington Crossroads, Inc. (1975), 275 Md. 171, 339 A. 2d 278; Poletown Neighborhood Council v. City of Detroit (1981), 410 Mich. 616, 304 N.W. 2d 455; Yonkers Community Dev. Agency v. Morris (1975); 37 N.Y. 2d 478, 373 N.Y.S. 2d 112, 335 N.E. 2d 337, appeal dismissed (1975), 423 U.S. 1010.[8]

The role of the judiciary in determining whether the power of eminent domain has been exercised for a public purpose is an extremely narrow one. Berman v. Parker (1954), 348 U.S. 26, 32, citing Old Dominion Co. v. United States (1925), 269 U.S. 55, United States, ex rel. T.V.A., v. Welch (1945), 327 U.S. 546. In Hawaii Housing Authority v. Midkiff (1984), 467 U.S. 229, the United States Supreme Court noted that it had never held a com-

8 Although we have not found an Ohio case expressly holding that economic redevelopment is a permissible "public use" for purposes of Article I, Section 19, we note that the Ohio Supreme Court has recognized that development of an industrial park by a municipality is a "proper public purpose" under Section 13, Article VIII of the Ohio Constitution. See, State, ex rel. Ryan, v. Council of Gahanna (1984), 9 Ohio St. 3d 126. Section 13, Article VIII provides an exception to the rule found in Section 6, Article VIII of the Ohio Constitution. However, a "proper public purpose" under Section 13, Article VIII is not necessarily synonymous with a "public use" for purposes of eminent domain.

pensated taking to be proscribed by the Public Use Clause of the Fifth Amendment where the exercise of the eminent domain power was rationally related to a conceivable public purpose. 467 U.S. at 241. The Court also stated that legislative determinations of what constitutes a public use are entitled to a great deal of deference since the legislature is the body best able to determine what a community's needs are and what purposes should be advanced through the taking power. 467 U.S. at 244. The Court went on to hold that use of the eminent domain power as part of a land reform program enacted by the Hawaii Legislature was rationally related to a legitimate public purpose. 467 U.S. at 245. In State, ex rel. Gordon, v. Rhodes (1951), 156 Ohio St. 81, the Ohio Supreme Court held that a legislative determination of what constitutes a public municipal purpose will not be reversed by the courts unless manifestly arbitrary or unreasonable. 156 Ohio St. at 97. See also, Grisanti v. Cleveland (App. 1962), 89 Ohio Law Abs. 1, appeal dismissed for want of a debatable constitutional question (1962), 173 Ohio St. 386.

It is commonly understood that unemployment, economic dislocation, and disinvestment in a downtown area are injurious to the general well-being of a community. It is neither manifestly arbitrary nor unreasonable for a municipality to determine that alleviation of these conditions is a desirable public goal. A city could rationally conclude that development of a strong central business district would lessen the impact of these problems since such a project would likely create jobs and promote retail trade. An urban revitalization project would also benefit a municipality by adding to the local tax base, allowing the city to use its existing service infrastructure, promoting energy conservation, and generally making the city a more attractive place to live and work. A central-

ly located urban redevelopment project would likely also have the effect of spurring development of other areas of the city, thereby benefitting the entire city and the surrounding region.[9] See, Lawrence, Constitutional Limitations on Governmental Participation in Downtown Projects (1982), 35 Vand.L.Rev. 277. One need only pay the most cursory attention to the campaigns of candidates for national, state and local public office to infer that the public expects that its public officers will be concerned with the vitality of the national, state, or local economies, as the case may be. Measures reasonably designed to promote the vitality of the national, state, or local economies are understood by the public at large as being a legitimate public purpose of government.

We hold that a city's decision to appropriate blighted or deteriorating land for an urban renewal project intended to rejuvenate a downtown area is conducive to the public welfare and constitutes a "public use" for purposes of Article I, Section 19.

Section 40.07 of the Dayton Revised Code of General Ordinances expressly authorizes the City to use its power of eminent domain to appropriate and clear deteriorating areas as part of urban renewal or urban redevelopment projects. The term "deteriorating area" is defined in Section 40.09 (C) (1) as follows:

> An area, whether predominately built up or open, which is not a slum, blighted, or deteriorated area but which, because of incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangements, obsolete platting, inadequate community and public utilities, diversity of ownership, tax delinquency, increased

9 One writer has suggested that a strong urban center is pivotal to an area's economic growth. See, J. Jacobs, Cities and the Wealth of Nations (1984).

> density of population without commensurate increase in new residential buildings and community facilities, high turnover in residential or commercial occupancy, lack of maintenance and repair of buildings, or any combination thereof, is detrimental to the public health, safety, morals, and general welfare, and which will deteriorate, or is in danger of deteriorating, into a slum, blighted, or deteriorated area[.]

The report submitted by the Planning Board to the City Commission supports a conclusion that the area surrounding the Arcade, including the Kuntz property, suffered from a lack of maintenance and repair. In addition, the report shows that the surrounding land was owned by a large number of people. Mr. Becher of the City Planning Board testified that the building in which the Kuntz property was located was owned by a number of different people and that, in his opinion, this diversity of ownership had a negative impact on upkeep of the building and made it difficult to get the concerted effort necessary to rehabilitate the building. Diversity of land ownership may be considered a blighting factor when it inhibits needed redevelopment. City of Birmingham v. Tutwiler Drug Co., Inc. (Ala. 1985), 475 So. 2d 458. There was also testimony at the trial that there were a number of unoccupied properties in the Arcade Square II project area and that vacancies as a general rule tend to have a deleterious effect on an area. Thus, while the area may not have been a "slum" as defined in the Dayton Revised Code of General Ordinances, the record supports a conclusion that it fit the definition of a deteriorating area.

Whether the Arcade Square II project is the best means of accomplishing the City's goals is not a matter properly cognizable by this court See, Hawaii Housing Authority v. Midkiff, supra, at

242-243. We simply hold that given the extreme deference to be accorded to legislative determinations of the public need, and the trend toward viewing economic development as a permissible public use, the City of Dayton's decision to appropriate Kuntz's property as part of the Arcade Square II project comported with Article I, Section 19 of the Ohio Constitution and with the Fourteenth Amendment of the United States Constitution.

B

In his reply brief, Kuntz argues that the appropriation of his property is fatally defective in that the City failed to comply with Section 40.14(E)(1) of the Dayton Revised Code of General Ordinances. That section provides as follows:

> (E) The ordinance of the Commission approving an urban renewal or redevelopment plan shall include the following findings:
>
> (1) Specific findings of fact as to the conditions in the project area which make it a slum, blighted, deteriorated, or deteriorating area, and findings that the project area is a slum, blighted, deteriorated, or deteriorating area.

As Kuntz correctly points out, neither Ordinance 27172 nor Ordinance 27306 contains an express statement by the Dayton City Commission that the Arcade is a slum or a deteriorating area. Also, neither ordinance sets forth specific findings of fact by the City as to the conditions in the project area which make it a slum or deteriorating area.

However, both of the ordinances declare that the Dayton City Commission has reviewed and accepts the Arcade Square II urban renewal report prepared by the City Planning Baord. In so doing, the Commission implicitly adopted the factual findings contained

in that report, including the architect's evaluation of each building. By incorporating the Arcade Square II report, the City in effect made factual findings supporting a conclusion that the buildings in the project area, including the building in which the Kuntz property was located, were in a deteriorating state.

While the report prepared by the City Planning Board provides findings as to conditions in the project area, it does not contain a conclusion that the area surrounding the Arcade was a slum or a blighted area or a deteriorating area. By its terms, Section 40.14(E)(1) requires that the City Commission make such a finding.

However, the preamble to Ordinance 27407, the ordinance which directed the city attorney to make application to the Montgomery County Court of Common Pleas, contains a statement that immediate acquisition of the Kuntz property is necessary to expedite redevelopment of the project area and thereby prevent slum, blight, and deterioration which exists or existed in the project area. Although Ordinance 27407 was not the ordinance which adopted the Arcade Square II plan, it was passed as part of the City's efforts to implement the plan. Thus, we conclude that Ordinance 27407 can be read in conjunction with Ordinance 27172 and Ordinance 27306 as providing the necessary finding of blight or deterioration required by Section 40.14(E)(1).

The burden imposed by Section 40.14(E) of the Dayton Revised Code of General Ordinances is far from onerous. The City Commission could easily have met the requirements of the statute by including a statement in the ordinance adopting Arcade Square II that the project area was deteriorating or a slum and findings of fact supporting such a conclusion. However, considering Ordinances 27172 and 27306 together with the Arcade Square II report and

Ordinance 27407, we conclude that the Dayton City Commission has substantially complied with Section 40.14(E)(1).

Kuntz's First Assignment of Error is overruled.

III

Kuntz's Second Assignment of Error is as follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS-APPELLANTS IN FINDING THAT THERE WAS NO STATUTORY OBLIGATION TO PROVIDE A RELOCATION PLAN TO DEFENDANTS' TENANT.

In his Second Assignment of Error, Kuntz argues that the City Commission's appropriation of his property is invalid since the City failed to draw up a relocation plan for his tenant, the Alladin Cleaners. Kuntz claims that the City's duty to provide relocation assistance is imposed by Section 40.12(B) of the Dayton Revised Code of General Ordinances. That section provides as follows:

> A relocation plan shall indicate a feasible method for the relocation of individuals and families displaced from the project area, and that there are or are being provided in the project area, or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, and at rents or prices within the financial means of the individuals and families to be displaced from the project area; decent, safe and sanitary dwellings equal in number to the number of such displaced individuals or families, and available to them and reasonably accessible to their places of employment.

In his Decision and Entry, Judge Nichols held that since Kuntz's tenant was a commercial establishment, this provision had no application to the present case. On appeal, Kuntz contends that his tenant was a "displaced person" and was therefore entitled to receive relocation assistance from the City under Section 40.12(B). According to Kuntz, the City's failure to provide this assistance invalidates its attempt to appropriate his land. However, it is not necessary that we address ourselves to the merits of this argument.

In order for Kuntz to be able to assert his claim, he must demonstrate that he has suffered or will suffer concrete injury as a result of the City's alleged failure to draw up a relocation plan for his tenant. See, Cleveland v. Shaker Heights (1987), 30 Ohio St.3d 49, 51; State, ex rel. Consumers League of Ohio, v. Ratchford (1982), 8 Ohio App. 3d 420, 424; Cincinnati v. Reed (1985), 17 Ohio App. 3d 115, 119-120. While Kuntz owned the property in which the Alladin Cleaners was located, there is no indication in the record that he had any further interest in the business, or that he has been injured or is likely to suffer injury as a result of the City's failure to comply with Section 40.12(B).[10] Absent such an interest, Kuntz has no standing to assert a claim based on the City's inaction.

The Second Assignment of Error is overruled.

IV

Both of Kuntz's Assignments of Error having been overruled, the judgment of the trial court will be affirmed.

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10 In addition to the common law "personal stake" doctrine, standing may also be conferred by statute. Middletown v. Ferguson (1986), 25 Ohio St.3d 71, 75, certiorari denied (1987), 107 S. Ct. 883. However, Kuntz has not cited any statute that gives him standing to assert his claim.

KERNS, P.J., and WOLFF, J., concur.

Copies mailed to:

J. Anthony Sawyer

Robert E. Manley

Hon. John W. Kessler

APPENDIX C

COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

Case No. 86-2439

Judge Nichols

Sitting on assignment

THE CITY OF DAYTON, OHIO

Plaintiff

vs.

DECISION & ENTRY

WILLIAM KUNTZ III, et al.

Defendants :

The within action was commenced by the City of Dayton, Plaintiff, against William Kuntz III, et al., Defendants, by the filing of a complaint for apropriation pursuant to R.C. 163.01 et seq. Defendants answered with denial, affirmative defenses and counterclaim. By bifurcation, the issue of the right of Plaintiff to appropriate Defendants' realty through eminent domain was litigated before the Court.

In Berman v. Parker, (1954), 348 U.S. 26, the United States Supreme Court concluded that the Housing Act of 1949, 42 USCS Sections 1441-1460, was intended "... to redesign the whole area so as to eliminate the conditions that cause slum..." Congress expressed its legislative intention in 42 USCS Section 1441 that there be an elimination of substandard and inadequate housing and clearance of slum and blighted areas and included the "... development and redevelopment of communities and ... the advancement of the growth, wealth, and security of the Nation." Indeed, where local communities qualify for federal aid to carry out urban renewal projects, they are required under 42 USCS Section 1451(c) to furnish a "workable program" which includes an official plan dealing with urban slums and blight within the community and for the establishment and preservation of "a well planned community."

The very thrust of urban renewal projects is a recognition by governmental units and the courts as hereinafter addressed, that substandard, decayed and blighted areas exist in cities throughout the nation which constitute a serious and growing problem injurious to public safety, health, morals and welfare.

As pointed out in Berman v. Parker, supra, at page 35:

> We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums. Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after

owner were permitted to resist development programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.

In State ex rel. Bruestle v. Rich (1953), 159 Ohio St.58, the Ohio Supreme Court considered a mandamus proceeding brought by the City Solicitor to require the City of Cincinnati to take certain action regarding a slum rehabilitation program. By ordinance, the city council found that the land in question lay in an area in which the majority of the structures were detrimental to public health, safety, and welfare and constituted a blighted area. As a remedial action, the city adopted the Laurel Redevelopment Area which included acquisition by the city of all lands in the project area that were necessary to carry out the project redevelopment plan. The city intended to acquire the land through use of eminent domain for the purpose of reselling it to private developers for their private purpose and profit. In opposition to such plan, it was argued that it would involve violation of Section 19, Article I of the Constitution of Ohio and the Fourteenth Amendment of the Constitution of the United States. The Supreme Court found that:

An examination of those ordinances and of that contract clearly discloses that the redevelopment of this area contemplates the acquisition by the city, either by purchase or through the exercise of the right of eminent domain, of the property located in the area, the elimination of slum conditions in the area by clearing therefrom the buildings and making the land available for redevelopment, and the subsequent sale of the land for redevelopment with restrictions as to its use which will insure against recurrence of any slum or other conditions of blight and discloses that

> the primary purpose of the development of this area is to eliminate the slum conditions and other conditions of blight and provide against the recurrence.

The Supreme Court recognized that the exercise of eminent domain and the expenditure of public funds for urban renewal projects was constitutionally permissible as a "public use." Furthermore, property taken for "the public welfare" in an urban renewal project was property "taken for public use." Property taken by eminent domain to further urban renewal need not be taken exclusively for "the public welfare" or for public uses or for public purposes. Therefore, an urban renewal project directed at the elimination of a slum or other blighted condition with provisions against recurrence is conducive to the public welfare and a public purpose. Acquisiton of property in furtherance thereof is a public purpose.

In Eighth & Walnut Corp. v. Public Library, supra, at page 147, the Court held:

> . . . blight is the diagnosis and urban renewal the cure, the latter following inevitably from the former and both required to justify, constitutionally, the surgical technique of eminent domain. It is not dispositive merely to assert that the city has declared the area within which the property in question is located to be a blighted area, and does not determine all legal issues to prove that this step has been properly taken, if it is clearly shown that the city's plans to use the property once acquired are irrelevant to any reasonable design for eliminating the blight.

Dayton City Ordinance (D.C.O.) 40.01 created within the city the Department of Urban Development. D.C.O. 40.03 vested with

the department the redevelopment of real estate in urban renewal areas including the responsibility of land acquisition by appropriation in accordance with charter provisions.

The city found in D.C.O. 40.07 "That there exist within the city, slum, blighted, deteriorated, and deteriorating areas of the nature defined in Section 40.09 which constitute a serious and growing menace injurious and inimical to the public health, safety, morals and general welfare of the residents thereof. . ." The city found that such areas were detrimental for public health and safety reasons, constituted economic and social liabilities and impaired and arrested sound growth of the community. Police powers were inadequate to regulate the condition. Th city then found that "the elimination in whole or in part of slum, blighted, deteriorated, and deteriorating areas, and the prevention of the occurrence or recurrence of such areas by redevelopment and by the conservation, rehabilitation and reconditioning, to the extent feasible, of the salvagable portions of such areas, and by other activities pursuant to urban development or urban renewal as defined herein, are public uses and purposes for which public money may be expended and private property acquired by purchase by . . . eminent domain, and are governmental functions. . ."

D.C.O. 40.08 provided for the ". . . redevelopment where necessary, of the entire city in accordance with the comprehensive plan and program of the city. . . to prevent the spread of slums and blight and to eliminate slums, blighted, deteriorated, and deteriorating areas of the city."

D.C.O. 40.09 defined a slum, blighted or deteriorated area in subsection (L) as:

> An area within the corporate limits of the city in which there are a majority of structures or other improvements, which, by reason of dilapidation, deterioration, age or obsolescence, inadequate, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsafe and unsanitary conditions or the existence of conditions which endanger life or property by fire or other hazards and causes, or any combination of such factors, and an area with overcrowding or improper location of structures on the land, excessive dwelling unit density, detrimental land uses or conditions, unsafe, congested, poorly designated streets or inadequate public facilities or utilities, all of which substantially impairs the sound growth and planning of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals, and general welfare.

Pursuant to such authority, Plaintiff prepared a comprehensive urban renewal plan for Arcade Square. The real estate was acquired by purchase, and the arcade was rehabilitated according to law. The project opened in 1980; but, although fully renovated, it lacked financial success. In its application for an urban development Action Grant from HUD, Plaintiff claimed that the lack of success of Arcade Square included: "... a lack of critical mass for the project; a lack of cash for tenant improvements ... (and) the substantially blighted condition of the block in which the Arcade is located; and the lack of parking within the block." (emphasis added)

In accordance with its legal authority, Plaintiff prepared or had prepared substantial information, data and plans for the

development through urban renewal of phase two of Arcade Square. City Council had for consideration: The Urban Design Plan for Downtown Dayton, Ohio; Development and Design Considerations For Phase Two Development of Arcade Square; Market Analysis For Office Development, Arcade Block, City of Dayton, Ohio; studies relative to relocation plans; environmental impact statements; a comprehensive future land use plan; and, the Arcade Square II Urban Renewal Plan.

Based on the information from all sources, including those just enumerated, council passed D.C.O. 27172 and thereby adopted a comprehensive plan for rehabilitation of the "Arcade Square II Urban Renewal Area." Its decision was based upon ". . .such study and the facts, findings and recommendations therein, (and) also upon th general knowledge and information which the Commission has of the facts and conditions in the project and their effect upon the health, safety and welfare of the people who work in and own property and otherwise use the aforesaid project area."

On December 4, 1985, D.C.O. 27172 was repealed by D.C.O. 27306 which adopted the Arcade Square II Urban Renewal Project which required ". . . the timely acquisition of property and elimination of deteriorating influences in the project area. . ."

Finally, pursuant to the authority, Plaintiff adopted D.C.O. 27407 to appropriate Defendant's real estate wherein the ordinance provided the ". . .property be immediately appropriated as the earliest possible acquisition of the property herein is necessary to expedite the redevelopment of said Project Area and to thereby prevent the recurrence of the conditions of slum, blight and deterioration which exist or existed in the Project Area. . ."

Defendants complain that Plaintiff failed to find through its City Commission that the Arcade Square II Urban Renewal Project Area was a slum in a blighted or deteriorated condition as a condition precedent to appropriation. Defendants assert that the only finding made by council was that the buildings in the area in question were substandard. There is no question that such finding standing alone would be insufficient to permit condemnation to further urban renewal. Looking at the record as a whole, and in particular D.C.O. 27407, it is obvious that the report relative to the soundness of the structures was only one of many factors taken into account by the City Commission when it found that appropriation was necessary to prevent recurrence of slum, blight and deterioration. D.C.O. 27172 and D.C.O. 27306 referred to the general knowledge and information which the commission had of the facts and conditions and their effect upon the health, safety and welfare of the people.

R.C. 163.09 provides, inter alia, that "A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity of the appropriation shall be prima-facie evidence of the necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity."

Defendants simply failed to contradict or explain away by other evidence of equal or greater weight the prima-facie quality of the relevant ordinances. The Court is not entitled to substitute its judgment for that of the City Commission and there is no clear showing that council excluded its constitutional or statutory authority or that it abused its discretion. Nor was the determination of slum, blight or deterioration manifestly arbitrary or unreasonable. The area in question was in a deteriorated and

blighted condition. And, there was a reasonable relationship between the act of urban renewal and remedy to the existing problem.

Defendants urge that the attempted appropriation is fatally flawed for failure to apply a relocation plan to Defendants' tenant. D.C.O. 40.12(B) requires a relocation plan "... of individuals and families displaced from the project." Defendants' tenant operates a commercial establishment on the subject property; therefore, the requirement is inapplicable to the case sub judice.

R.C. 163.04 requires that "appropriations shall be made only after the agency is unable to agree, for any reason, with the owner, or if more than one, any owner. . ." It is obvious from the record that no agreement was reached with William Kuntz III relative to a purchase price for the realty. Therefore, the condition precedent was not without respect to the record regarding Peter J. Walsh, Trustee in Bankruptcy for One Westminister, Inc.

From the evidence, the Court cannot find that the appropriation in question nor the project as a whole will tend to displace blacks in a constitutionally impermissible manner. Defendants cite Davis v. School District of the City of Pontiac (1970), 309 F.2d 734, in support of their position that the city has an affirmative duty to avoid the elimination of shops that cater to blacks so as to reduce black traffic in the area. The Davis case is inapposite. It deals with school desegregation; and, it holds that a school board cannot use neighborhood schools for furtherance and perpetration of racial discrimination when the board participated in a policy of segregation. There is no evidence to support Defendants' position that the City, through the use of urban renewal, is causing racial segregation or engaging in conduct which will tend to cause it.

Lastly, although Plaintiff asserts that it is entitled to condemn Defendants' realty under its general powers of eminent domain, the fact remains that the instant suit was instituted within the framework of urban renewal. Therefore, the right to condemn generally is not before the Court.

For the reasons herein stated, Defendants have failed to meet their burden of proof in support of their answer. Therefore, the Court affirmatively finds that Plaintiff has the right to appropriate the subject realty.

Judgment is entered accordingly.

Bond for appeal is set at $100,000.00.

_____

Robert D. Nichols, Judge

COURT OF COMMON PLEAS

MONTGOMERY COUNTY, OHIO

CIVIL DIVISION

Case No. 86-2439

THE CITY OF DAYTON, OHIO
Plaintiff

Judge Kessler

JUDGMENT ENTRY

vs.

WILLIAM KUNTZ III, et al.
Defendants

Pursuant to Ohio Revised Code Section 163.14, this cause came on to be heard for an assessment of compensation due to Defendants for land taken, to-wit:

> Situated in the City of Dayton, County of Montgomery, State of Ohio and described as follows: being part of lot numbered ONE HUNDRED SIXTY (160) of the revised and consecutive numbers of lots on the plat of the said City of Dayton, and being more particularly described as follows: beginning at a point in the north line of said lot numbered one hundred sixty (160) a distance of forty nine feet and one inch (49' 1") east of the northwest corner of said lot; thence southwardly along a line parallel to the west line of said lot being along the centerline of the wall and columns of a proposed building, a distance of eighty eight feet (88') to a corner; thence eastwardly along a line parallel to the north line of said lot, being along the north side of a seven (7') feet, six (6") inch private court to a point;

thence northwardly along a line parallel to the west line of said lot, being along the centerline of the wall and columns of said proposed building, a distance of eighty eight feet (88′) to a point in the north line of said lot; thence westwardly along the north line of said lot, a distance of eighteen feet (18′) to the place of beginning.

After due deliberation, the jury returned a verdict of Two Hundred Thirty Five Thousand Dollars ($235,000) as just compensation for said property.

Further, pursuant to Ohio Revised Code Section 163.15, this Court finds that upon deposit with the Court the aforesaid amount of compensation and costs assessed by the Court, the Plaintiff may take possession of said property.

This Court further finds that the bond previously assessed by Judge Nichols for appeal is appropriate under Ohio Revised Code Section 163.19 as security for "any further compensation and costs." Upon deposit of the compensation award, the court costs, and security as previously determined, Plaintiff shall have the right to take and use said property.

APPROVED:

_____

JOHN W. KESSLER, JUDGE

Copies of this Judgment Entry were forwarded to all parties listed below by ordinary mail this filing date.

Thomas P. Randolph, Attorney for Plaintiff, The City of Dayton, Ohio, 101 West Third Street, Dayton, Ohio 45402

Jeffrey P. Startzman, Attorney for Mark Garlikov, Suite 650 Talbott Tower, Dayton, Ohio 45402

Robert E. Manley, Attorney for Defendants, William Kuntz, Westminster Company, Inc., and Peter J. Walsh, Trustee, 4100 Carew Tower, Cincinnati, Ohio 45202

Carol E. Carlson, Attorney for First National Bank, The First National Bank, One First National Plaza, Dayton, Ohio 45402

Jan Marie Schuurman, Assistant Prosecuting Attorney, Attorney for Defendant, Joe Shump, Treasurer, 41 N. Perry Street, Room 308, Dayton, Ohio 45402

Tim Walker, Bailiff

APPENDIX D

By Mr Leonard No. 27172

AN ORDINANCE

Approving the Urban Renewal Plan for the Arcade Square II Urban Renewal Project, and Declaring An Emergency.

WHEREAS, Under the provisions of Sections 40.07 through 40.21 of the Revised Code of General Ordinances of The City of Dayton, Ohio the Commission is authorized to undertake Urban Renewal activities for the purposes of redeveloping and rehabilitating slum, blighted, deteriorated and deteriorating areas; and

WHEREAS, There has been prepared and submitted to the Commission a detailed report contained in a document entitled "Arcade Square II Urban Renewal Area" dated February, 1985 based upon studies made with respect to the location, physical structures, planned use, environmental influences, and social and economic conditions of the project area, which document proposes to complement private restoration work which has already occurred in the project area by the elimination of deteriorating influences and through redevelopment of several key sites in the area and restoration of some existing buildings, and the members of the Commission have been fully apprised of such report and studies and otherwise have independent general knowledge of the facts and conditions existing of the entire City of Dayton and would substantially prevent, impair or arrest the sound growth of

the project area and the surrounding areas and constitute an economic and social liability under present conditions and use; and

WHEREAS, The comprehensive plan of the City of Dayton has been prepared and is recognized and used as a guide for general development of the locality as a whole; and

WHEREAS, The 1979 Urban Design Plan for the Downtown Dayton has been prepared and adopted by the Commission as a guide for the development of the downtown area; and

WHEREAS, An Urban Renewal Plan consisting of a boundary description, project area report, urban renewal plan and relocation plan and project improvements report entitled "Arcade Square Urban Renewal Area" dated February, 1985 was prepared and submitted to this Commission; and

WHEREAS, The City Plan Board which is the duly designated and acting official planning body for the City of Dayton submitted to the Commission its report and recommendation that said Urban Renewal Plan conforms to the comprehensive plan for the City of Dayton as a whole as well as specifically conforming to the Center City Design Plan for the downtown area and this Commission duly considered said report, recommendation and certification; and

WHEREAS, After due notice a public hearing on said Urban Renewal Plan was held by the Commission on March 27, 1985, at which time all persons and organizations were provided an opportunity to be heard either in support of or in opposition to said Urban Renewal Plan; and

WHEREAS, Said Urban Renewal Plan for the project area prescribes clearance and redevelopment and restoration of a portion of the block known as the Arcade Square; and will require among other things the imposition of land use categories, rehabilitation standards and design objectives relating to the privately financed redevelopment and restoration of certain parcels of land and structures in the project area; and

WHEREAS, The Project area which is presently commercial and residential in character shall retain such uses under the Urban Renewal Plan; and

WHEREAS, The Project entails the acquisition and clearance of private property by the City, and contemplates the relocating of 47 existing tenants, the costs of relocation made necessary as a result of the acquisition of privately owned properties shall be borne by the City; and

WHEREAS, The successful completion of the Arcade Square II Urban Renewal Project requires the timely acquisition of property and elimination of deteriorating influences in the Project area and it is therefore necessary for the immediate preservation of the public peace, property, health and safety that this ordinance take effect at an early date; now therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON

Section 1. That this Commission hereby accepts the aforesaid project area report and based not only upon such study and the facts, findings and recommendations therein, but also upon the general knowledge and information which the Commission has of the facts and conditions in the project area and their effect upon the health, safety and welfare of the people who work in and own

property and otherwise use the aforesaid project area, this Commission hereby finds and determines (1) that seventeen of the nineteen buildings in the project area are rated substandard to the degree requiring acquisition, clearance and redevelopment in conformance to the criteria indicated in the aforesaid project area report; and (2) that two of the nineteen buildings in the project area are listed on the National Register of Historic Places and have previously been rehabilitated.

Section 2. That said Urban Renewal Plan submitted by the City Plan Board for the project has been duly reviewed and considered and is hereby approved and adopted, and the City Manager is directed to file a copy of said Urban Renewal Plan with the minutes of this meeting.

Section 3. That it is hereby found and determined that said Urban Renewal Plan for the project area is feasible and conforms to said comprehensive plan and program for the overall development of the City and to the workable program of the City.

Section 4. That it is hereby found and determined that the objectives of the Urban Renewal Plan can be achieved through acquisition of existing buildings and redevelopment of the project area.

Section 5. That the redevelopment of the project area for both commercial and residential uses is necessary for the proper development of the community.

Section 6. That it is hereby found and determined that the Urban Renewal Plan for the urban renewal area will afford maximum opportunity for the redevelopment of such area by private enterprise.

Section 7. That it is hereby found and determined that, in accordance with the relocation policy, the costs of any relocation made necessary by acquisition and clearance of existing buildings in the Project Area shall be borne by the City.

Section 8. For the reasons stated in the preamble hereof, this ordinance is declared to be an emergency measure and shall take effect immediately upon its passage.

Passed by the Commission March 27, 1985

Signed by the Mayor March 27, 1985

/s/ MAYOR OF THE CITY OF DAYTON, OHIO

Attest:

/s/ Don L. Crawford

Clerk of Commission

Approved as to form and legality:

/s/City Attorney

By Mr. Henry No. 27306

AN ORDINANCE

Amending Section 1 of Ordinance 27172 Relating to the Urban Renewal Plan for the Arcade Square II Urban Renewal Project, and Declaring an Emergency.

WHEREAS, The Commission enacted Ordinance 27172 on March 27, 1985, accepting the Project Area Report for the Arcade Square II Urban Renewal Project and making certain findings which are now to be expanded and clarified; and

WHEREAS, The successful completion of the Arcade Square II Urban Renewal Project requires the timely acquisition of property and elimination of deteriorating influences in the Project Area, and it is therefore necessary for the immediate protection of the public peace, property, health and safety that this ordinance take effect at an early date; now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

Section 1. That Section 1 of Ordinance 27172 as passed by the Commission on March 27, 1985 be and it is hereby amended to read as follows:

Section 1. That this Commission hereby accepts the aforesaid project area report and based not only upon such study and the facts, findings and recommendations therein, but also upon the general knowledge and information which the Commission has of the facts and conditions in the project area and their effect upon the health, safety and welfare of the people who work in and own property and

otherwise use the aforesaid project area, this Commission hereby finds and determines (1) that nine of the fourteen buildings in the project area are rated substandard to the degree requiring acquisition, clearance and redevelopment in conformance to the criteria indicated in the aforesaid project area report; (2) that four of the fourteen buildings in the project area are listed or are eligible to be listed on the National Register of Historic Places; (3) that acquisition of said structures will not have an adverse environmental impact; (4) that such acquisition will not limit choices among competing alternatives; and (5) will not alter the environmental premises on which the pending clearance is based in such a fashion that the validity of the conclusions to be reached would be affected.

Section 2. That Section 1 of Ordinance 27172, as passed by the Commission on March 27, 1985 be and it is hereby repealed.

Section 3. For the reasons stated in the preamble hereof, this ordinance is declared to be an emergency measure and shall take effect immediately upon its passage.

Passed by the Commission Dec. 4, 1985

Signed by two Commissioners Dec. 4, 1985

/s/_____

/s/_____

Two Commissioners of the City of Dayton, Ohio

Attest:

/s/_____

Don L. Crawford

Clerk of Commission

Approved as to form and legality:

/s/ J. Anthony Sawyer

City Attorney

TPR:skm

11/27/85

By Mr. Henry No. 27407

AN ORDINANCE

To Appropriate Property Being Parcel 6 Located at 44 W. Third Street in Connection with the Arcade Square II Urban Renewal Project, and Declaring an Emergency.

WHEREAS, the City Commission by Resolution No. 4101, adopted May 14, 1986 heretofore declared its intention to appropriate the property hereinafter described for clearance and redevelopment purposes as part of the plan for the Arcade Square II Urban Renewal Project; and

WHEREAS, the City and the owners have been unable to agree on the purchase price of the property; and

WHEREAS, it is necessary for the immediate preservation of the public peace, property, health and safety that this ordinance take effect at the earliest possible time, for the reason that this property be immediately appropriated as the earliest possible acquisition of the property herein is necessary to expedite the

redevelopment of said Project Area and to thereby prevent the recurrence of the conditions of slum, blight and deterioration which exist or existed in the Project Area, now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

Section 1. That there is by appropriated for the purpose stated in the preamble hereof the fee simple interest in the following described property, to-wit:

Parcel 6

Situated in the City of Dayton, County of Montgomery, State of Ohio and described as follows: being part of lot numbered ONE HUNDRED SIXTY (160) of the revised and consecutive numbers of lots on the plat of the said City of Dayton, and being more particularly described as follows: beginning at a point in the north line of said lot numbered one hundred sixty (160) a distance of forty nine feet and one inch (49′ 1″) east of the northwest corner of said lot; thence southwardly along a line parallel to the west line of said lot being along the centerline of the wall and columns of a proposed building, a distance of eighty eight feet (88′) to a corner; thence eastwardly along a line parallel to the north line of said lot, being along the north side of a seven (7′) feet, six (6″) inch private court to a point; thence northwardly along a line parallel to the west line of said lot, being along the centerline of the wall and columns of said proposed building, a distance of eighty eight feet (88′) to a point in the north line of said lot; thence westwardly along the north line of said lot, a distance of eighteen feet (18′) to the place of beginning.

Said property being located at 44 W. Third Street.

Section 2. That the City Attorney be, and he hereby is authorized and directed to apply to the Court of Common Pleas of Montgomery County, Ohio for the purpose of assessing compensation to be paid for such property.

Section 3. The cost and expense for such property and appropriation is to be paid from Account No. 26400-2110-2501-210.

Section 4. For the reasons stated in the preamble hereof, this ordinance is declared to be an emergency measure and shall take effect immediately upon its passage.

Passed by the Commission June 18, 1986

Signed by the Mayor June 18, 1986

/s _____

MAYOR OF THE CITY OF DAYTON, OHIO

Attest:

/s/ _____

Clerk of the Commission

Approved as to form and legality:

/s/ _____

City Attorney

tpr:skm

6/10/86

APPENDIX E

DAYTON CODE OF ORDINANCES

Chapter 40: Department of Urban Development

Section 40.14 Public Hearing and Commission Action

(A) The Commission, before approving a general neighborhood renewal plan or an urban renewal or urban redevelopment plan, shall hold a public hearing on the plan at which an opportunity shall be provided to all persons interested to be heard either in person or by counsel, which hearing may be adjourned from time to time. Notice of the date, time, and place of such hearing will be published in a newspaper of general circulation in the city once a week for 2 consecutive weeks on the same day of the week, and at least 7 full days shall elapse between the second publication and the date set for the public hearing. The notice shall also contain a description of the project area by its location in relation to highways, streets, water-courses, or other natural or artificial boundaries, and shall also designate the place at which the plan, maps, plats, and other materials describing the project area are and will be available for public inspection.

(B) Following the completion of such public hearing, the City Commission may either approve or reject the general neighborhood renewal plan or the urban renewal or urban redevelopment plan, or make modifications and approve such plan as modified.

Such general neighborhood renewal plan or urban renewal plan or urban redevelopment plan as modified shall be resubmitted to the Plan Board, for its written approval or recommendations pursuant to the provisions of Section 40.13 whenever the following conditions obtain:

(1) The boundaries of the project area are extended to include any land (except land contained within the right-of-way lines of a dedicated street or alley) not included in the urban renewal or urban redevelopment plan upon which the public hearing was held pursuant to division (A), or if there is added a type of urban renewal or redevelopment plan upon which the public hearing was held pursuant to division (A) which requires the acquisition of property, or if there is any change deemed by the Commission to be substantial in land use or redevelopment restrictions contained in the urban renewal or urban redevelopment plan upon which the public hearing was held pursuant to division (A).

(2) Such modifications are other than in accordance with the recommendations of the City Plan Board. Whenever these conditions obtain, a public hearing shall be held on such urban renewal or urban redevelopment plan as modified prior to approval thereof by the Commission in accordance with the provisions of division (A).

(C) When the Commission wishes to approve a general neighborhood renewal plan, or an urban renewal or redevelopment plan, it shall do so by ordinance passed by not less than a majority vote, pursuant to the city charter.

(D) The ordinance of the Commission approving a general neighborhood renewal plan should contain a finding that the plan conforms to the comprehensive plan and program and to the work-

able program of the city and such other findings as may be necessary or desirable but need not contain the other findings set forth below in division (E) for approval of urban renewal or redevelopment plans. Such approval of a general neighborhood renewal plan may be made before or at the same time as the approval of an urban renewal or redevelopment plan for a project within the general neighborhood renewal area.

(E) The ordinance of the Commission approving an urban renewal or redevelopment plan shall include the following findings:

(1) Specific findings of fact as to the conditions in the project area which make it a slum, blighted, deteriorated, or deteriorating area, and findings that the project area is a slum, blighted, deteriorated, or deteriorating area.

(2) That the size and character of the area and the location of elements of slum, blight, and deterioration in the area make it appropriate for urban renewal activities.

(3) That the proposals for the proper relocation of individuals and families displaced in carrying out the project in decent, safe, and sanitary dwellings in conformity with acceptable standards are feasible and can be reasonable and timely effected to permit the proper prosecution and completion of the project; and that such dwellings or dwelling units available or to be made available to such displaced individuals and families are at least equal in number to the number of displaced individuals and families, are not generally less desirable in regard to public utilities and public and commercial facilities than the dwellings of the displaced individuals and families in the project area, are available at rents or prices within the financial means of the displaced individuals and

families, and are reasonably accessible to their places of employment.

(4) That the plan for the project area will afford maximum opportunity consistent with the sound needs of the community as a whole for the rehabilitation or redevelopment of the project area by private enterprise.

(5) That the plan conforms to the existing comprehensive plan and program for the overall development of the city.

(6) Such additional findings as may be required if federal aid is needed.

(F) The Clerk of the Commission shall certify as true and correct and deliver to the City Manager a copy of the aforesaid ordinance of the Commission approving the plan for appropriate further action, and any documents which were submitted to the Commission to support findings made in the ordinance shall be filed with a copy of the ordinance.

(G) The taking effect of the ordinance approving an urban renewal or redevelopment plan shall constitute authority to spend moneys of the city appropriated for carrying out urban renewal or redevelopment activities in accordance with the plan, as well as the proceeds of bonds or notes issued for such purpose, and to accept advances, gifts, donations, and grants from the federal government, the state, any entity, instrumentality, or subdivision of either, or from any other entity or person for such purpose. (Or. 18736, passed 5-8-57; amend. Ord. 22647, passed 9-6-67)

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-749

IN THE

Supreme Court of the United States

October Term, 1988

WILLIAM KUNTZ III and
WESTMINISTER COMPANY, INC.,
aka ONE WESTMINISTER COMPANY, INC.,
Petitioners.

vs.

THE CITY OF DAYTON, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18pp

I.

QUESTION PRESENTED

Were the Ohio Courts Correct In Their Determination That The Eradication Of Urban Blight And Deterioration By A Municipal Corporation Through The Exercise Of The Power Of Eminent Domain Is Rationally Related To The Furtherance Of The Public Welfare And Not In Contravention Of The United States Constitution Or The Constitution Of The State Of Ohio?

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vs.

THE CITY OF DAYTON, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

This case originated in the common pleas court of Montgomery County, Ohio, when the City of Dayton, Ohio (Respondent) filed a Complaint for appropriation of property pursuant to Chapter 163 of the Ohio Revised

Code. William Kuntz III and Westminister Co. Inc., a corporation solely owned by Kuntz, (Petitioners) were two of the owners of the appropriated property located in the downtown area of the City of Dayton. The trial court upheld the right of Respondent to appropriate the subject property and a jury awarded compensation to Petitioners in the amount of $235,000 which has been paid into the court.

The state court of appeals unanimously affirmed the verdict of the trial court and The Supreme Court of Ohio overruled Petitioners' motion for an order directing the court of appeals to certify its record and found no substantial constitutional question to exist. The Ohio Supreme Court subsequently denied Petitioners' motion for rehearing.[1]

[1] The references are to the opinions and orders of the Ohio Courts which are appended to the Petition for Writ of Certiorari.

THE FACTS

Briefly stated, the facts found by the Ohio common pleas court and affirmed as having substantial support in the evidence by the court of appeals of the state are as follows:

On March 27, 1985, the Dayton City Commission passed Ordinance 27172, adopting an urban renewal plan approved by the City Plan Board which was known as Arcade Square II.

The trial court found that in approving the Arcade Square II urban renewal plan, the City Commission had before it for its consideration facts and conditions in the project area and findings as to their effect upon the health, safety and welfare of the people who work in and own or use property in the project area. Specific documents before the Commission included: The Urban Design Plan For Downtown Dayton, Ohio; Development and Design Considerations For Phase Two Development of Arcade Square; Market Analysis For Office Development, Arcade Block, City of Dayton, Ohio; blight study which included the Project Area Report containing the detailed results of the blight study conducted on the buildings in the Arcade Square II Urban Development Area; studies relative to relocation plans; environmental impact statements; a comprehensive future land use plan; and the Arcade Square II Urban Renewal Plan.[2]

The Arcade Square II renewal plan objectives included the clearance of a significant portion of the renewal area, excluding from clearance only those structures on or eligible for inclusion in the National

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[2] Petitioners' Appendix C, p. 49.

Register of Historic Places, and the construction of an office building and a parking garage. The acquisition of Petitioners' property was necessary for the construction of the parking garage.

Petitioners each owned part of an undivided interest in the building located on the appropriated property. A tenant commercial establishment known as Alladin Cleaners was the only occupant of the property. According to the architect's inspection report quoted in the opinion of the court of appeals, the subject building was deficient in the following respects:

> Plumbing: Abandoned and/or inoperable fixtures exist at all levels of both occupied and nonoccupied areas. The number and locations of existing fixtures is inadequate to comply with current code requirements.
>
> Heating: Inoperable (not currently used).
>
> Electrical: Electric systems are inoperable and inadequate for nonoccupied areas.
>
> Lighting & Ventilation: Inoperable windows and mechanical ventilation systems (some areas lack mechanical ventilation) lighting is inoperable and inadequate.
>
> Fire Safety: Ingress and egress from mezzanine and second floor is inadequate. There are no enclosed internal stairs leading to the exterior. Two such stairs would be required by current codes.
>
> Windows and Doors: Exit access corridors are nonexistent and doors for such are nonexistent. Exterior walls with limited fire separation are questionable as to the fire ratings and doors. Windows in these walls are not currently rated for even minimum opening requirements.[3]

[3] Petitioners Appendix B, p. 27.

A hearing on the Respondent's right to appropriate the Petitioners' property was held before Visiting Judge Robert D. Nichols on February 2, 3, and 4, 1987. In a Decision and Entry filed February 23, the trial court held that Petitioners had failed to carry their burden of proof under Section 163.09 of the Ohio Revised Code to show that Respondent had abused its discretion in determining that it was necessary to appropriate their property. According to the court, the area in question was in a deteriorated and blighted condition and there was a reasonable relationship between the remedy of urban renewal and the problem of blight and deterioration.[4]

[4] Petitioner's Appendix C.

REASONS FOR DENYING THE WRIT

This case presents no question of unsettled law. As a matter of fact, every major city in Ohio has at one time or another over the past thirty-five years used its home rule urban renewal powers in an effort to revitalize aging and deteriorating downtown commercial properties and, in the process, has exercised its powers of eminent domain.

The Municipal Exercise Of The Power Of Eminent Domain To Eliminate Urban Blight And Deterioration Does Not Violate The Public Use Provisions Of The Fifth Amendment Or The Due Process Clause Of The Fourteenth Amendment To The United States Constitution Nor The Public Welfare Provision Of Section 19, Article I Of The Ohio Constitution.

The power of eminent domain is a basic attribute of sovereignty superior to all private rights. *Georgia v. City of Chattanooga*, 264 U.S. 472,480 (1924). This power, however, is circumscribed by the Fifth and Fourteenth Amendments to the United States Constitution. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

The public use requirements of the Fifth and Fourteenth Amendments to the United States Constitution are defined in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, *supra*.

> ".... Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia .... or the

> States legislating concerning local affairs .... This principle admits no exception merely because the power of eminent domain is involved ...." *Berman v. Parker,* Id. at 32.

Similarly in *Hawaii v. Midkiff, supra.*

> "To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation is paid.....' But where the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause....." Id. 241.

The seminal case defining a proper public purpose under the Ohio Constitution is *State ex rel. Gordon v. Rhodes,* 156 Ohio St. 81 (1951) wherein the second paragraph of the syllabus provides:

> "The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality, subject to review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable."

Following *State ex rel. Gordon v. Rhodes, supra,* the Ohio Court decided another landmark urban renewal case, *State ex rel. Bruestle v. Rich,* 159 Ohio St. 13 (1953). In *Bruestle* the Court determined that property taken for "the public welfare" is property taken for a "public use." Further it was decided that if the primary purpose for the exercise of eminent domain is to acquire property for the public welfare that power may be exercised under Section 19, Article I of the Ohio Constitution even where there may be an incidental

nonpublic use of the property or benefit from its taking. Finally, in the fifth paragraph of the syllabus, the *Bruestle* court determined:

> "The elimination of slum *and other conditions of blight* and provisions against their recurrence are ordinarily conducive to 'the public welfare' as these words are used in Section 19 of Article I of the Ohio Constitution." (Emphasis added).

Made implicitly clear in *State ex rel. Gordon v. Rhodes, supra,* and *State ex rel. Bruestle v. Rich, supra,* is the fact that in Ohio both the power of eminent domain and the power of urban renewal are home rule powers directly conferred on Ohio municipalities by virtue of Section 3 of Article XVIII of the Ohio Constitution.

Petitioners state the issue presented in their petition for certiorari as follows:

> "This court must determine whether the Dayton ordinances authorizing the exercise of the City's eminent domain powers, contained the legislative findings required by the laws in the State of Ohio and the ordinances of the City of Dayton, Ohio."[5]

After reviewing the evidence, both the trial court and the court of appeals concluded that in enacting the Arcade II urban renewal plan and in authorizing the condemnation of Petitioner's property, the municipal legislative branch had before it evidence from which it could have concluded that the area in question was a slum, blighted or deteriorating area and that the elimination of such conditions was a proper public purpose for the exercise of the municipal power of eminent domain.

---

[5] Petitioners Brief, p. 13.

The trial court and the court of appeals found that Petitioners failed to prove that the Respondent's action in designating Petitioners' property as part of an urban renewal area was arbitrary, capricious or unreasonable. In the words of the trial court:

> "Defendants [Petitioners] simply failed to contradict or explain away by other evidence of equal or greater weight the prima facie quality of the relevant ordinances. This court is not entitled to substitute its judgment for that of the City Commission and there is no clear showing that council excluded [exceeded] its constitutional or statutory authority or that it abused its discretion. Nor was the determination of slum, blight or deterioration manifestly arbitrary or unreasonable. The area in question was in a deteriorated and blighted condition. And, there was a reasonable relationship between the act of urban renewal and remedy to the existing problem."[6]

The Court of Appeals came to the same conclusion:

> ". . . . After reviewing the record we conclude that the City's decision to appropriate Kuntz's property was not arbitrary or unreasonable and was supported by the necessary findings of fact. . . . . Consequently the judgment of the trial court will be affirmed."[7]

The Ohio court of appeals directly addressed the Petitioners' contention that the legislative findings of the Dayton City Commission were not sufficient as a matter of law. It concluded that upon review of Dayton Ordinance 27172 (adopting the urban renewal plan for the Arcade II Urban Renewal Project) and Ordinance 27306 (amendment to Ordinance 27172 making specific findings of conditions in the Arcade II Urban Renewal

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[6] Petitioners' Appendix C, pp. 50-51.

[7] Petitioners Appendix B, p. 25.

Project), it was clear that the Dayton City Commission had considered, reviewed and accepted the report of the City Plan Board. In so doing, the court found that the Commission had implicitly adopted the factual findings contained in the report of the City Plan Board and embraced the conclusion that the buildings in the project area, including Petitioners' building, were in a deteriorating state.[8] The Ohio court further found from its examination of the record that Ordinance 27407[9] (the ordinance that directed the city attorney to proceed with the appropriation of Petitioners' property) contained a statement that the immediate acquisition of such property was necessary to prevent the recurrence of the condition of slum, blight and deterioration which exist or existed in the project area. Therefore, the court of appeals determined that Ordinance 27407 when read in conjunction with Ordinance 27172 and Ordinance 27306 provided the necessary finding of blight and deterioration needed to satisfy the requirements of law.

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[8] Petitioners' Appendix B, pp. 38-39.

[9] Respondent's Appendix A.

CONCLUSION

The trial court and the court of appeals followed the precedents of Ohio law in finding that a municipal corporation may use its home rule power of eminent domain in furtherance of an urban renewal program to eliminate blight from its deterioration downtown business districts. This is a question long settled in Ohio, witness the numerous urban renewal programs that have already aided the rejuvenation of the downtown commercial core of many communities. The Respondent has acquired and paid a fair jury awarded compensation for the subject property, has demolished a substandard building on the property and is in the midst of preparing for further redevelopment.

For all the reasons stated herein, the Petition For Certiorari should be denied since there has been no violation of Petitioners' rights under either the Fifth or Fourteenth Amendments to The United States Constitution.

Respectfully submitted,

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APPENDIX

RESPONDENT'S EXHIBIT A

By Mr. Henry No. 27407

AN ORDINANCE

To Appropriate Property Being Parcel 6 Located at 44 W. Third Street in Connection with the Arcade Square II Urban Renewal Project, and Declaring an Emergency.

WHEREAS, The City Commission by Resolution No. 4101, adopted May 14, 1986 heretofore declared its Intention to appropriate the property hereinafter described for clearance and redevelopment purposes as part of the plan for the Arcade Square II Urban Renewal Project; and

WHEREAS, The City and the owners have been unable to agree on the purchase price of the property; and

WHEREAS, It is necessary for the immediate preservation of the public peace, property, health and safety that this ordinance take effect at the earliest possible time, for the reason that this property be immediately appropriated as the earliest possible acquisition of the property herein is necessary to expedite the redevelopment of said Project Area and to thereby prevent the recurrence of the conditions of slum, blight and deterioration which exist or existed in the Project Area, now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

Section 1. That there is by appropriated for the purpose stated in the preamble hereof the fee simple interest in the following described property, to-wit:

Parcel 6

Situated in the City of Dayton, County of Montgomery, State of Ohio and described as follows: being part of lot numbered ONE HUNDRED SIXTY (160) of the revised and consecutive numbers of lots on the plat of the said City of Dayton, and being more particularly described as follows: beginning at a point in the north line of said lot numbered one hundred sixty (160) a distance of forty nine feet and one inch (49′ 1″) east of the northwest corner of said lot; thence southwardly along a line parallel to the west line of said lot being along the centerline of the wall and columns of a proposed building, a distance of eighty eight feet (88′) to a corner; thence eastwardly along a line parallel to the north line of said lot (being along the north side of a seven (7′) feet, six (6″) inch private court to a point; thence northwardly along a line parallel to the west line of said lot, being along the centerline of the wall and columns of said proposed building, a distance of eighty eight feet (88′) to a point in the north line of said lot; thence westwardly along the north line of said lot, a distance of eighteen feet (18′) to the place of beginning.

Said property being located at 44 W. Third Street.